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In The

Supreme Court of the United States

OCIE MILLS AND CAREY MILLS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. MORGAN*?

PARTIES TO THE PROCEEDING

Petitioners are Ocie and Carey Mills. They were the Defendants in a criminal prosecution in the trial court and the Appellees in the Eleventh Circuit Court of Appeals.

Respondent is the United States of America, which was the Plaintiff/prosecution in the criminal case in the trial court and was the Appellant in the Eleventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit Opinion (Appendix A) is reported at *United States of America v. Mills*, 221 F.3d 1201 (11th Cir. 2000). The district court opinion (Appendix B) was entered on August 13, 1999.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 8, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution. The Sixth Amendment states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a trial . . . by an impartial jury . . . "

STATEMENT OF THE CASE

In 1989, following a jury trial without assistance of counsel, the Millses, father and son, were convicted of discharging pollutants and unlawfully excavating a canal in the waters of the United States, in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., and the River and Harbors Act, 33 U.S.C. § 403 et seq., respectively. The unlawful conduct in question was the Millses' (1) placement of landfill on lots they had purchased knowing that the United States Army Corps of Engineers, having designated a portion of the land a wetland, required a permit for any further development, and (2) enlargement of an existing drainage ditch. See *United States v. Mills*, 221 F.3d 1201, 1202 (11th Cir. 2000), *Mills v. United States*, 36 F.3d 1052, 1054 (11th Cir. 1994) (per curiam), and *United States v. Mills*, 817 F. Supp. 1546-1548 (N.D. Fla. 1993).

Both were sentenced to twenty-one months' imprisonment, one year of supervised release, and a fine of $5,000. 817 F. Supp. at 1546. The convictions were summarily affirmed on direct appeal. See *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).

In 1990 Ocie Mills filed a *Bivens*[1] action challenging his arrest and prosecution. The district court dismissed the complaint. The Eleventh Circuit affirmed the dismissal.

In 1991, the district court denied the Millses' motion to vacate their sentences under 28 U.S.C. § 2255. See *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993).

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The District Court stated in its opinion that, at the time in question, the subject land was probably not a "wetland" for purposes of the Clean Water Act. *Id.* at 1548. That decision, too, was affirmed on appeal. See *Mills*, 36 F.3d 1052, 1057 (11th Cir. 1994). The United States Supreme Court denied certiorari. See *Mills v. United States*, 514 U.S. 1112, 115 S. Ct. 1966, 131 L. Ed. 2d 856 (1995). As of November 21, 1991, the Millses had completed their terms of imprisonment and supervised release.

On April 11, 1996, the Millses filed a petition for writ of error *coram nobis*. The basis for the petition was an attached affidavit from Quentin Wise, one of the jurors in the Millses' 1989 criminal trial. Wise contacted Ocie Mills after seeing Mills air his grievances against the government in a television program. Wise's affidavit stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses that had not been introduced into evidence at trial. According to the affidavit, the source of Smith's extrinsic information was Smith's son, who allegedly had worked for the "State of Florida Water Management" and was familiar with the Millses and their previous misconduct and problems with the government. Wise's affidavit also stated that Wise felt intimidated by jury foreman Smith.

The district court declined to adopt the report and recommendation and instead concluded that the Millses had stated a cognizable basis for relief. It remanded the matter to the magistrate judge for an evidentiary hearing on the substance of the Millses' allegations of jury misconduct. The district court denied the government's motion for reconsideration, but granted its motion under 28 U.S.C. § 1292(b) to certify the matter for interlocutory

appeal. By order dated December 3, 1999, the court of appeals granted the government permission to appeal under § 1292(b).

On August 8, 2000, the Court of Appeals reversed the decision of the trial court and remanded for entry of judgement for the government. Relying upon this Court's decision in *United States v. Mayer*, 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914), the Eleventh Circuit held that allegations of jury impartiality are not cognizable on *coram nobis* as error of the most fundamental character. (App. 8).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. MORGAN.*

The Sixth Amendment to the United States Constitution expressly guarantees every accused person the right in a criminal prosecution to have the right to a trial by an impartial jury. This Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888 (1991).

In 1954, the Supreme Court's decision in *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954), revived the ancient writ of *coram nobis* by holding that the writ was available in federal courts pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *Morgan*, 346 U.S. at 506, fn.6, 511, 74 S. Ct. at 250, fn.6, 252; see *United States v.*

Swindall, 107 F.3d 831, 834 (11th Cir. 1997). The Supreme Court specifically stated that the enactment of 28 U.S.C. § 2255 is not a bar to *coram nobis*, and a district court has the power to grant *coram nobis*. *Morgan*, 346 U.S. at 511, 74 S. Ct. at 252. The Supreme Court held in *Morgan*:

> Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

Id.

The Supreme Court also held:

> [when] no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court. (footnote omitted) Otherwise a wrong may stand uncorrected which the available remedy would right.

Morgan, 346 U.S. at 512, 74 S. Ct. at 253. *Morgan* also noted that in *United States v. Mayer*, 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914) the Supreme Court stated that *coram nobis* included errors "of the most fundamental character." *Id.*

In *Morgan*, the defendant pled guilty in 1939 and filed his petition for writ of *coram nobis* sometime after 1950, alleging a violation of his Sixth Amendment constitutional right through failure, without his competent waiver, to furnish him counsel. 346 U.S. at 503-04, 74 S. Ct. at 248-49. In 1954, the United States Supreme Court held that although Morgan had served his prison term,

the power to remedy an invalid sentence exists, and Morgan was entitled to an opportunity to attempt to show that the conviction was invalid. *Morgan*, 346 U.S. at 512-13, 74 S. Ct. at 253.

Ocie and Carey Mills have met all the requirements of *United States v. Morgan*. They have been deprived of their Sixth Amendment constitutional right to a trial by an impartial jury. The Millses have no other remedy available and sound reasons exist for failure to seek appropriate earlier relief. Within approximately one month of receiving information about the misconduct of the jury, the Millses filed their petition for writ of error *coram nobis* in the trial court. (App. 16). The extraordinary writ of *coram nobis* must be heard by the district court or otherwise a wrong will stand uncorrected which the available remedy would right.

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English.

Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965).

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of

> impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. . . .

Irvin v. Dowd, 366 U.S. at 722, 81 S. Ct. at 1642.

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that all the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Turner v. Louisiana*, 379 U.S. at 472-73, 85 S. Ct. at 550. The right to a trial by jury in serious criminal cases is "fundamental" to the American scheme of justice, and includes as its most important element the right to a trial by an impartial jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993).

In a criminal case, any private communication, contact, or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Maddox v. United States*, 146 U.S. 140, 148-50, 13 S. Ct. 50, 52-53, 36 L. Ed. 917 (1892), *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L. Ed. 654 (1954).

In the *instant* case, the Eleventh Circuit Court of Appeals held:

> We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree because, as a theoretical proposition, this argument is not without persuasiveness. After all, the Sixth Amendment expressly guarantees the right to trial by an impartial jury, and the United States Supreme Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution." See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).
>
> Nevertheless, the argument that allegations of jury impartiality should be cognizable on *coram nobis* as error of the most fundamental character may be compelling, but it is not the law. See *Mayer*, 235 U.S. at 69, 35 S. Ct. 16.

> [The Supreme Court has told us] more than once . . . that, "[i]f precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court, the prerogative of overruling its own decisions." (Citations omitted).

(App. 8-9). The decision of *United States v. Mayer, supra,* and the Eleventh Circuit's decision in the *instant* case, conflicts with this Court's decision in *United States v. Morgan, supra.*

Relying upon *United States v. Mayer, supra,* the Eleventh Circuit held that claims of misbehavior or partiality of jurors must be raised by a motion for new trial, as newly discovered evidence. (App. 4, 9-10). In 1989 when the Millses were convicted and in 1996 when they filed their petition for writ of error *coram nobis,* there was a two year statute of limitations to file a motion for new trial alleging newly discovered evidence pursuant to Rule 33, Fed. R. Crim. P. (1988). Rule 33 was amended in 1998 and now provides for a three year statute of limitations to file a motion for new trial alleging newly discovered evidence.

United States v. Morgan, supra, did not place a statute of limitations upon Constitutional error which was not previously known to a person unjustly convicted of a crime. Petitioners have suffered an error of the most fundamental character. Ocie and Carey Mills' Sixth Amendment right to an impartial jury trial is no less important than Morgan's Sixth Amendment right to

counsel. Morgan was allowed by this Court to raise his *coram nobis* claim more than eleven years after his Sixth Amendment violation. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14934

D.C. Docket No. 88-03100-CR-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

OCIE MILLS, CAREY MILLS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(Filed August 8, 2000)

Before CARNES, MARCUS and FARRIS*, Circuit Judges.

FARRIS, Circuit Judge:

We decide whether the defendants-appellees, Ocie Mills and Carey Mills, may seek extraordinary relief by way of a writ of coram nobis based on their allegation that jurors in their criminal trial considered extrinsic

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* Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

evidence. We reverse and remand for entry of judgment for the government.

The material facts are undisputed. In 1989, following a jury trial, the Millses, father and son, were convicted of discharging pollutants and unlawfully excavating a canal in the waters of the United States, in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., and the Rivers and Harbors Act, 33 U.S.C. § 403 et seq., respectively. The unlawful conduct in question was the Millses' (1) placement of red clay landfill on lots they had purchased knowing that the United States Army Corps of Engineers, having designated a portion of the land a wetland, required a permit for any further development, and (2) enlargement of an existing drainage ditch. *See Mills v. United States*, 36 F.3d 1052, 1054 (11th Cir. 1994) (per curiam).

Both were sentenced to twenty-one months' imprisonment, one year of supervised release, and a fine of $5,000. The convictions were summarily affirmed on direct appeal. *See United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).

In 1990, Ocie Mills filed a *Bivens*[1] action challenging his arrest and prosecution. The district court dismissed the complaint. The Eleventh Circuit affirmed the dismissal.

In 1991, the district court denied the Millses' motion to vacate their sentences under 28 U.S.C. § 2255. *See United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993).

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

That decision, too, was affirmed on appeal. *See Mills*, 36 F.3d 1052, 1057 (11th Cir. 1994). The United States Supreme Court denied certiorari. *See United States v. Mills*, 514 U.S. 1112 (1995).

As of November 21, 1991, the Millses had completed their terms of imprisonment and supervised release.

On April 11, 1996, the Millses filed a petition for writ of error coram nobis. The basis for the petition was an attached affidavit from Quentin Wise, one of the jurors in the Millses' 1989 criminal trial. Wise contacted Ocie Mills after seeing Mills air his grievances against the government in a television program. Wise's affidavit stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses that had not been introduced into evidence at trial. According to the affidavit, the source of Smith's extrinsic information was Smith's son, who allegedly had worked for the "State of Florida Water Management" and was familiar with the Millses and their previous misconduct and problems with the government. Wise's affidavit also stated that Wise felt intimidated by jury foreman Smith.

The district court declined to adopt the report and recommendation and instead concluded that the Millses had stated a cognizable basis for relief. It remanded the matter to the magistrate judge for an evidentiary hearing on the substance of the Millses' allegations of jury misconduct. The district court denied the government's motion for reconsideration, but granted its motion under 28 U.S.C. § 1292(b) to certify this matter for interlocutory appeal. By order dated December 3, 1999, we granted the government permission to appeal under § 1292(b).

THE PARTIES' CONTENTIONS

A. The Government's Position

Relying primarily on United States Supreme Court authority, the government contends that the basis for the Millses' coram nobis petition – newly discovered evidence that the jury considered extrinsic evidence and therefore was not impartial – is unavailable to remedy alleged "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence." *See United States v. Mayer*, 235 U.S. 55, 69 (1914); *United States v. Morgan*, 346 U.S. 502, 512 (1954). The government points out that the writ of coram nobis is available only to remedy errors "of the most fundamental character," *see Mayer*, 235 U.S. at 69, and argues that expanding the availability of coram nobis relief by permitting the Millses to proceed would undermine the finality of criminal convictions and the sanctity of jury deliberations.

B. The Millses' Position

The Millses contend that the government has misread *Mayer*, which, in their view, does not foreclose pursuit of coram nobis relief on the basis they have asserted. In the Millses' view, coram nobis relief is available where, as here, it is necessary to achieve justice when no other remedy is available and sound reasons exist for failure to seek earlier relief.

DISCUSSION

The issue is purely a question of law, which we review de novo. *See United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000).

Federal courts have authority to issue a writ of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a). The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice. *See United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997). A court's jurisdiction over coram nobis petitions is limited to the review of errors "of the most fundamental character." *Mayer*, 235 U.S. at 69.[2] Such errors do not include "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence." *Id.* In addition, courts may consider coram nobis petitions only where no other remedy is available and the petitioner presents sound reasons for failing to seek relief earlier. *See Morgan*, 346 U.S. at 512.[3]

The Millses have challenged the applicability of the holding in *Mayer* to this case. The defendant in *Mayer*, Albert Freeman, was convicted in federal district court of

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[2] The writ of coram nobis has been abolished in civil cases. *See* Fed. R. Civ. P. 60(b).

[3] When *Mayer* was decided, district courts held formal terms of operation lasting for a specified period. *See* 28 U.S.C.A. § 138 (West 1993) (in particular Historical and Statutory Notes, 1948 Acts). A district court could entertain a motion for new trial only if it was filed during the same term of court in which the judgment was entered. *See Mayer*, 235 U.S. at 67-69; Fed. R. Civ. P. 77 advisory committee's note.

misuse of the mails. *See Mayer*, 235 U.S. at 56. He appealed his conviction. *See id.* Ten months later, after the expiration of the term of court during which Freeman's judgment of conviction was entered, Freeman filed a motion in district court to set aside his conviction or for a new trial.[4] One of the grounds for the motion was Freeman's allegation that, during voir dire, one juror concealed a bias against Freeman. *See id.* at 57. Despite, (1) the expiration of the term of court during which Freeman was convicted, and (2) Freeman's pending appeal of his conviction, the government purported to consent to the district court's jurisdiction over the new trial motion. District Court Judge Mayer granted the motion. The government obtained an order from the court of appeals directing Judge Mayer to show cause why a writ of prohibition should not issue forbidding the granting of a new trial.

The Supreme Court held that the district court was without jurisdiction to entertain Freeman's new trial motion for two independent reasons: (1) the term during which Freeman's conviction issued had expired, and the facts did not warrant recognizing any exceptions to this jurisdictional bar, *see id.* at 67-69, and (2) once Freeman appealed his conviction in the court of appeals, the district court was deprived of jurisdiction over his case despite the government's purported consent, *see id.* at 71.

The Court explained that where errors of the most fundamental character existed, a district court might have

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[4] The government recognizes that no other remedy is available to the Millses and that they have presented sound reasons for failing to seek relief earlier.

"correctional jurisdiction" like that available at common law under coram nobis. *Id.* at 69. The Court, however, explicitly refused to decide whether the writ of coram nobis remained an available remedy in the federal courts, and further stated that, even if it was, such relief would be unavailable to Freeman. *See id.* at 69. The Court ultimately held that the proper remedy "[i]n cases of prejudicial misconduct in the course of trial, the misbehavior or partiality of jurors, and newly discovered evidence" is "by a motion for a new trial." *Id.*

Subsequent controlling opinions have confirmed the applicability in federal courts of the writ of coram nobis and, moreover, have treated *Mayer* as the source of the applicable rule governing the circumstances under which coram nobis relief is available. Specifically, the Court in *United States v. Morgan*, 346 U.S. 502, 512-13 (1954), citing *Mayer*, held that criminal defendants could pursue coram nobis relief to remedy errors "of the most fundamental character." *Morgan*, 346 U.S. at 512 (citation omitted).[5]

Post-*Morgan* decisions by the Supreme Court, the Fifth Circuit, and the Eleventh Circuit have treated Mayer as the source of the controlling rule on the availability of coram nobis relief. *See Carlisle v. United States*, 517 U.S. 416, 428-29 (1996) (citing *Mayer* for the applicable standard governing coram nobis petitions, and stating that it is difficult to conceive of a situation in a federal criminal

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[5] The circumstances in *Morgan* warranting the defendant's pursuit of coram nobis relief were his allegations that, without his competent waiver, the district court had failed to appoint him counsel. *See id.* at 504.

case today in which coram nobis relief would be necessary or appropriate); *United States v. Addonizio*, 442 U.S. 178, 186 (1979) (citing *Mayer* for the proposition that coram nobis relief is limited to errors of the most fundamental character); *Lowery v. United States*, 956 F.2d 227, 230 (11th Cir. 1992) (per curiam) (treating *Mayer* standard as controlling); *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (treating *Mayer* standard as controlling, and affirming denial of coram nobis petition based on allegations of newly discovered evidence); *Granville v. United States*, 613 F.2d 125, 126 n.1 (5th Cir. 1980) (per curiam) (treating *Mayer* standard as controlling); *United States v. Carter*, 437 F.2d 444, 445 (5th Cir. 1971) (same).

We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree because, as a theoretical proposition, this argument is not without persuasiveness. After all, the Sixth Amendment expressly guarantees the right to trial by an impartial jury, and the United States Supreme Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

Nevertheless, the argument that allegations of jury impartiality should be cognizable on coram nobis as error of the most fundamental character may be compelling, but it is not the law. *See Mayer*, 235 U.S. at 69.

> [The Supreme Court has told us] more than once . . . that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

> case which directly controls, leaving to this Court, the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989); accord, *e.g., Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997) ("We do not acknowledge and we do not hold that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). We have followed that admonition. *See Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) ("It may be that the Supreme Court has cut *Alexander* [*v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of Alexander. We will leave that to the Supreme Court, which has admonished courts of appeals . . . '[to leave it] the prerogative of overruling its own decisions.' ") (quoting *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. at 1921-22); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997).

Jefferson County v. Acker, 210 F.3d 1317, 1319 (11th Cir. 2000).

Relying on *Mayer*, we have held that allegations of newly discovered evidence are not cognizable in a petition for coram nobis. *See Moody*, 874 F.2d at 1577 (holding that coram nobis is improper vehicle for claims of newly discovered evidence, and observing that coram nobis petitions are similar to motions for new trial).

We therefore reject the Millses' argument that the government's reading of *Mayer* is incorrect. In the Millses' view, *Mayer* simply decided that Freeman could not seek relief in district court because he had another remedy available to him, i.e., pursuit of the appeal of his conviction.

The Millses, however, are mistaken. The Court's two grounds for concluding that the district court lacked jurisdiction in *Mayer* were independent, each alone sufficient to dispose of the case. The Supreme Court's holding in *Mayer* that Freeman's appeal of his conviction deprived the district court of jurisdiction did not affect its separate holding that Freeman had failed to allege error of a fundamental character such as would have warranted pursuit of coram nobis relief at common law.

We reverse and remand for entry of judgment for the government.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES
OF AMERICA,

v.

CASE NO. 88-03100/RV

OCIE MILLS and
CAREY C. MILLS,

Defendants.
_____/

ORDER

This matter is before me now for consideration of the Magistrate Judge's Report and Recommendation dated March 17, 1999. The defendants have been furnished a copy of the Report and Recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of those portions to which an objection has been made.

The petition under consideration is the petition for writ of error *coram nobis* filed by the defendants. The defendants were originally convicted by jury trial in 1989 of five counts of discharging pollutants into the waters of the United States without a permit, in violation of the Clean Water Act 33 U.S.C. § 1251 *et seq.*], and one count of unlawfully excavating a canal in the navigable waters of the United States, in violation of the Rivers and Harbors Act [33 U.S.C. § 403 *et seq.*]. The were each sentenced by the late Senior Judge Winston E. Arnow to a term of

twenty-one months imprisonment, followed by one year of supervised release, and a fine of $5,000. The defendants' convictions were affirmed upon direct appeal in *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990) (table). The defendants filed a motion to vacate sentence pursuant to Title 28, United States Code, Section 2255. Although I determined that their offenses of conviction were based upon seriously flawed legal principles, I was forced to conclude that any change in the law had to be made by Congress and not by the Courts. Therefore, I denied their motion on March 31, 1993. *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993). That decision was subsequently affirmed by the Eleventh Circuit Court of Appeals in *United States v. Mills*, 36 F.3d 1052 (11th Cir. 1994). The Supreme Court of the United States also denied certiorari. *Cert. denied*, 514 U.S. 1112, 115 S.Ct. 1966, 131 L.Ed.2d 856 (1995).

In their current petition for writ of error *coram nobis*, the defendants contend that they are entitled to a new trial because of juror misconduct. Attached as an exhibit to the petition is the affidavit of Quentin Wise, a member of the jury that convicted the defendants. Wise states in his affidavit that Mr. Smith, the foreman of the jury, repeatedly told Wise that defendant Ocie Mills had prior cases, that the defendant had threatened environmental people on his property with a gun, and that if the defendant was found guilty, he would not be sentenced to a prison term and would only have to remove soil from the property. (doc. 185, att.) Wise also states that Mr. Smith told Wise that "he was familiar with Ocie Mills' prior problems and wrong doings because his son was employed with the State of Florida Water Management."

Id. The defendants indicate that Quentin Wise contacted the defendants after watching a television program featuring defendant Ocie Mills on March 3, 1996.

According to the government, the defendants have not stated a claim for which relief can be granted pursuant to a writ of error *coram nobis*. Under the Rules of Criminal Procedure, a motion for new trial on newly discovered evidence must be filed within three years after the verdict or finding of guilt. Rule 33, Fed. R. Crim. P. The government contends that the issue of juror misconduct should have been raised in a timely motion for new trial, and cannot be raised in a petition for writ of error coram nobis. The government concludes that because a motion for new trial based upon newly discovered evidence is untimely, the petition must be denied. The Magistrate Judge agreed, and recommended denial of the petition. (doc. 194)

Federal courts have authority to issue a writ of error *coram nobis* under the All Writs Act [28 U.S.C. § 1651(a)]. The writ is a limited remedy of last resort, and is limited to cases in which "no statutory remedy is available or adequate." *Lowery v. United States*, 956 F.2d 227, 228-29 (11th Cir.1992) (citations omitted). "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511, 74 S. Ct. 247, 252, 98 L. Ed. 248 (1954). "Such compelling circumstances exist only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular

and invalid." *Moody v. United States*, 874 F.2d 1575, 1576 (11th Cir. 1989) (citing *United States v. Mayer*, 236 U.S. 55, 69, 35 S. Ct. 16, 19-20, 59 L. Ed. 129 (1914)).

The government relies primarily upon *Moody v. United States*, 874 F.2d 1575 (11th Cir. 1989). In *Moody*, the petitioner sought relief from a conviction on the ground of newly discovered evidence that allegedly proved that he did not commit the crime. The district court dismissed the petitioner's petition for writ of error *coram nobis*. On appeal, the Eleventh Circuit defined the issue as whether the petitioner's allegation of newly discovered evidence was the "fundamental type of irregularity" for which the writ provided a remedy. *Id.* at 1577. The Eleventh Circuit held that "[a] claim of newly discovered evidence relevant only to the guilt or innocence of the petitioner is not cognizable in a *coram nobis* proceeding." *Id.* According to the Eleventh Circuit, "[t]he rule that new evidence is not a claim for which the writ . . . may be issued is consistent with the limitation imposed on movants seeking a new trial based upon newly discovered evidence." *Id. See Reid v. United States*, 149 F.2d 334 (5th Cir. 1945) (petitioner was denied relief because coram nobis petition was, in substance, merely an untimely motion for a new trial based on newly discovered evidence).

In this case, the defendants allege that juror misconduct occurred when the foreman of the jury obtained information about the defendants from outside the courtroom and communicated such information to other jurors during the trial. This is newly discovered evidence, but the time for a new trial on that ground has long expired and there is no statutory remedy now available. Thus, the defendants' only possible source of relief is via a writ of

error *coram nobis*. The issue presented is whether the substantive allegation supporting the defendants' present challenge to their convictions involve a "fundamental" constitutional principle.

Among the most fundamental protections available to an accused is the right to trial by an impartial jury guaranteed by the Sixth Amendment. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6, 96 S. Ct. 1017, 1020 n.6, 47 L. Ed. 2d 258 (1976); *Singer v. United States*, 380 U.S. 24, 36, 85 S. Ct. 783, 790, 13 L. Ed. 2d 630, 638 (1965). The requirement that the jury verdict be based on the evidence produced at trial "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. State of Louisiana*, 379 U.S. 466, 472, 86 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965). "Extrinsic evidence, evidence that has not been subject to the procedural safeguards of a fair trial, threatens such constitutional safeguards as the defendant's right of confrontation, of cross-examination, and of counsel." *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984). When jurors consider extrinsic evidence, a new trial is required if the evidence "poses a reasonable possibility of prejudice to the defendant." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990). Although the defendant has the burden of demonstrating prejudice, the court must investigate an alleged impropriety "upon merely a colorable showing of extrinsic influence." *Id.*

The defendants' allegation of juror misconduct is not merely a "claim of newly discovered evidence relevant only to the guilt or innocence of the petitioner." *Moody*, 874 F.2d at 1577. Instead, the defendants have alleged a constitutional violation that affects the validity of the

underlying proceeding. The defendants have alleged a fundamental constitutional error, as did the defendant in *United States v. Morgan, supra,* who alleged that he was not advised of his constitutional rights and did not competently or intelligently waive counsel prior to entering his plea of guilty. Upon consideration of the *Morgan* petition, the Supreme Court of the United States held:

> Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate other relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court.

United States v. Morgan, supra, 346 U.S. at 511-12, 74 S. Ct. at 252-53.

In this case, the defendants did not become aware of the alleged juror misconduct until well after the time limits had expired on all normally available avenues of relief. The defendants filed the present petition approximately a month after learning of the alleged misconduct. Because the defendants have alleged facts that would support a claim of constitutional error – a fundamental error that could potentially render the underlying proceeding invalid – the defendants are entitled to an evidentiary hearing and an opportunity to present evidence supporting their petition. *See, e.g., Lujan v. United States,* 424 F.2d 1053 (5th Cir. 1970); *United States v. Carlino,* 400 F.2d 56 (2d Cir. 1968).

Having considered the report and recommendation and all objections thereto timely filed by the parties, I have determined that the report and recommendation

should not be adopted. Instead, the matter is remanded to the Magistrate Judge for an evidentiary hearing on the petition for writ of error *coram nobis*.

DONE AND ORDERED this 13th day of August, 1999.

/s/ Roger Vinson
ROGER VINSON
Chief Judge

Supreme Court, U.S.
FILED
DEC 12 2000
CLERK

(2)

No. 00-722

In the

Supreme Court of the United States

OCIE MILLS and CAREY MILLS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the decision of the Eleventh Circuit Court of Appeals conflicts with the decision of this Court in *United States v. Morgan*?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise.

This case arises from an increasing tendency by government agencies to invoke criminal statutes to coerce, compel, or redress conduct arising from activities which would have in former times been considered, at most, civil wrongs. Indeed, the conduct which provided the basis for what is all but conceded to have been a misguided criminal prosecution in this case would not have been of interest to any agency--federal or state--a scant few years ago. Yet, as will be shown below, government agencies recently have not only exhibited an insatiable interest in enlarging their regulatory regimes, but have also reinforced that expanded authority with the veiled threat of criminal liability.

As if to underscore these proclivities, federal agencies today increasingly utilize another device to increase their sway upon the body politic, namely adopting regulatory interpretations that go well beyond the plain meaning and intent of the statutory authority conferred on them by Congress. The confluence of this penchant for expansion, aggressive interpretation, and the deployment of criminal process where it has heretofore not been envisioned creates a significant potential for citizen harm without any concomitant social or community good, as the facts of this case demonstrate. In a case

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

in which the results defy common sense and centuries of English and American legal tradition, two citizens of this country not only suffer convictions of crimes of which they are in all likelihood not guilty, but also find themselves time-barred, through no fault of their own, from contesting error of the most fundamental character that infected the trial that resulted in those convictions. Although exhibiting considerable discomfort with the result, the Eleventh Circuit Court of Appeals upheld these convictions on the basis of what it considered to be binding precedent of this Court.

PLF has participated in numerous cases involving the interpretation of federal laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Pacific Legal Foundation attorneys have also represented property owners like the petitioners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g. Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 2047, 2000 LEXIS 6596 (Oct. 10, 2000), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In addition, Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). PLF attorneys have also previously appeared in this case as cocounsel on issues

which have been previously resolved, *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

PLF submits that because of its considerable experience protecting civil rights including property rights before this Court, its participation here will add a valuable and unique perspective that will assist this Court's consideration of this case.

STATEMENT OF THE CASE

This case arises out of the 1989 felony convictions of a father and son, Ocie and Carey Mills, on five counts of "discharging pollutants into the navigable waters of the United States" in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and one count of unlawfully excavating a canal in the navigable waters of the United States, in violation of the Rivers and Harbors Act, 33 U.S.C. § 403, *et seq.* Petitioner's Appendix B at 11. The Millses' offense was the dumping of clean sand on a plot of subdivided dry land owned by them that the United States Corps of Engineers deemed to be a "wetland." *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993). For at least the last 22 years, since the Millses' property was subdivided, the land has not been wet beyond that which might briefly obtain after a Florida rainstorm--"it had no standing water on it, nor did it appear to be a marsh, swamp, or bog." *Id.*[2] The Millses bought the property in 1986. *Id.* at 1549.

This case has a lengthy and tortured procedural history. *See* Petitioners' Statement of the Case. However, during the

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[2] The property was described by the trial judge, who in 1991 viewed the property as part of a proceeding on a petition to enforce the conditions of a supervised release because of alleged failure of the petitioners to comply with a site restoration plan as being "mostly wooded, with large pine, oak, gum, bay, and magnolia trees, as well as lots of smaller trees and shrubs." *Id.*

course of one of the proceedings, it became apparent that at the time of the alleged offenses by the Millses, the subject land was probably not a "wetland" within the meaning of the Clean Water Act. *Id.* at 1548. In fact, any characteristics of the land under which it could have been so classified had been effaced long before the Clean Water Act Regulations on which the Millses were convicted became effective. *Id.*

The Milles were so incredulous that they could be prosecuted for placing clean fill on their own dry land, that they represented themselves without the benefit of counsel in their 1989 jury trial. *Mills v. United States*, 36 F.3d at 1056 n.6. Nevertheless, they were convicted, sentenced to 21 months in jail, 1 year of supervised release, and fined $5,000, as well as being required to comply with a site restoration plan.[3]

On April 11, 1996, Petitioners filed a petition for writ of error *coram nobis* contending that they were entitled to a new trial based upon juror misconduct. Attached as an exhibit to the petition is an affidavit of Quentin Wise, a member of the jury that convicted the defendants. The affidavit recites that Mr. Wise contacted Ocie Mills by telephone on March 3, 1996, after watching a television program where Mr. Mills was describing his grievances. Mr. Wise stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses' that had not been introduced into evidence at trial. According to the affidavit, the source of the information was Mr. Smith's son, who worked for the State of Florida Water Management. The affidavit states that the jury foreman had repeatedly told the jury that Ocie Mills had prior cases, that Mr. Mills had threatened environmental regulators

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[3] The knowing discharge of pollutants, without a permit, into the "navigable waters of the United States" is punishable by a fine of between $5,000 and $50,000, and imprisonment for not more than three years. 33 U.S.C. § 1319(c)(2). Sand is a "pollutant" under the Clean Water Act. 33 U.S.C. § 1362(6).

on his property with a gun, and that if Mr. Mills were found guilty, he would not be sentenced to a prison term and would only have to remove soil from his property. Mr. Wise also stated that he felt intimidated by Mr. Smith. Petitioner's Appendix B at 12; *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000).

The government in this case recognizes that no other remedy is available to the Millses on the facts stated and that the Millses have presented sound reasons for failing to seek relief earlier. *Id* at 1204 n.4. Nevertheless, the government contends that a writ of error *coram nobis* is unavailable to the Millses on the basis of this Court's reasoning in *United States v. Mayer*, 235 U.S. 55, 69 (1914), that "[i]n cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial . . . ."[4] Thus, the government contends that the Millses' application for a writ is time-barred since the time to file a motion for a new trial has passed. The Millses contend, to the contrary, that the jury misconduct alleged is of such fundamental character that the writ should issue.

SUMMARY OF THE ARGUMENT

Certiorari should be granted in this case because the decision of the Eleventh Circuit Court of Appeals below, *United States v. Mills*, 221 F.3d 1201, directly and irreconcilably conflicts with this Court's decision in *United*

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[4] Rule 33, Fed. R. Crim. P. provides that a court may grant a new trial based upon newly discovered evidence, but only if made within three years of the verdict. At the time the Millses were convicted, the time limit was two years. Rule 33, Fed. R. Crim. P. Advisory Committee Notes, 1998 Amendments. These deadlines had both passed before the Millses learned of the facts which form the basis for their writ of error *coram nobis*.

States v. Morgan, 346 U.S. 502 (1954). Certiorari is especially warranted here by the additional fact that the convictions at issue are based upon constitutionally questionable extensions of criminal liability under the Clean Water Act that, together with similar extensions in other environmental statutes, have increasingly resulted in the criminalization of conduct of citizens of the United States which formerly would have been treated as, at most, civil wrongs.

Ocie and Carey Mills were convicted in 1989 of five felony counts of discharging pollutants into the navigable waters of the United States in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq*. In 1993, factual and legal investigation resulting from a requirement that they restore the property demonstrated that the Millses were in all likelihood never guilty of the crimes with which they were charged. In 1996, the Mills additionally discovered that their fundamental right to a trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution had been violated. The Millses did not know or have reason to know of the juror misconduct prior to 1996. Despite the existence of this error, the Eleventh Circuit Court of Appeals declined to allow the issuance of a writ of error *coram nobis,* the only remedy available to them some ten years after their erroneous convictions.

A writ of error *coram nobis* is an extraordinary remedy of last resort which emanates from the all writs section of the Judicial Code, 28 U.S.C. § 1651(a). The writ may issue only under compelling circumstances involving error of the most fundamental character, which renders the proceeding itself irregular and invalid. This Court should reverse the decision of the Eleventh Circuit Court of Appeals and permit the granting of the writ on the compelling circumstances of this case.

ARGUMENT

I

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *UNITED STATES v. MORGAN*

A writ of error *coram nobis* is an extraordinary remedy of last resort. While no one doubts the availability of the writ in English common law, Archibold (7th ed., Chitty, 1840 350, 389), it has been questioned whether the writ continued to exist in modern criminal jurisprudence in the United States. In 1954, this Court squarely addressed and settled the issue, holding that a writ of error *coram nobis* was an available post-judgment ground for relief, but only under very limited circumstances. *United States v. Morgan*, 346 U.S. 502.

The power to issue the writ emanates from the all-writs section of the Judicial Code, 28 U.S.C. § 1651(a). *Id.* at 506. It has been said that the writ may issue only under "[s]uch compelling circumstances . . . involv[ing] a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Moody v. United States*, 874 F.2d 1575, 1576 (11th Cir. 1989) (citing *United States v. Mayer*, 235 U.S. at 69). In *Mayer*, the United States Supreme Court was asked to grant a writ of error *coram nobis* to consider allegations that a criminal conviction was improvidently obtained through prosecutorial misconduct and undisclosed juror bias. *Mayer* 235 U.S. at 58. While expressing no opinion on whether a writ of error *coram nobis* was available in modern American jurisprudence, the Court reasoned that even if it was, it could only be invoked to remedy error of the most fundamental character. The Court stated:

> [E]ven if it be assumed that in the case of errors in certain matters of fact, the district courts may

> exercise in criminal cases--as an incident to their powers expressly granted--a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis*, as to which we express no opinion, that authority would not reach the present case. *This jurisdiction was of limited scope; the power of the Court thus to vacate its judgments for errors of fact existed*, as already stated, *in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.*

Mayer, 235 U.S. at 69 (emphasis added, citation omitted).

One might think that violation of one's Sixth Amendment right to "enjoy the right to a trial . . . by an impartial jury" would fall squarely into that category of cases requiring the issuance of a writ. This Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). However, in *Mayer*, Chief Justice Hughes on behalf of the Court stated in arguably overly sweeping terms that a writ would be unavailable for either "misbehavior or partiality of jurors." *Mayer*, 235 U.S. at 69. The Court stated:

> In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by motion for a new trial.

Mayer, 235 U.S. at 69.

Although the district court judge granted the writ, apparently placing little weight on the sweeping language in *Mayer*, the Eleventh Circuit Court of Appeals reversed, finding

itself compelled to follow *Mayer*. However, even they were uncomfortable with the result they felt bound to reach:

> We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree.

United States v. Mills, 221 F.3d at 1205.

Although juror misbehavior whether by concealment of bias during voir dire or misconduct in the jury room through introduction of extra-judicial statements or evidence not received during the course of trial are serious offenses, PLF submits that *Mayer* is distinguishable on its facts. The issue in that case appears to have been one of extant juror bias that was either not discovered or not divulged during voir dire, but which theoretically could have been discovered. In the instant case, no amount of effort by the Millses could have revealed the error of which they complain.[5]

On the other hand, the decision of the Eleventh Circuit Court of Appeals below directly and irreconcilably conflicts with *United States v. Morgan*, 346 U.S. 502. In *Morgan*, this Court affirmed the issuance of a writ of error *coram nobis* where it appeared that the respondent Morgan had been convicted in violation of his constitutional right to be provided counsel. *Morgan*, 346 U.S. at 503. Ocie and Carey Millses' Sixth Amendment right to jury trial is no less important than

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[5] In fact, Fla. Bar Code Prof. Resp. D.R. 4-3.5(d) prohibits a lawyer in Florida from communicating with jurors after a verdict unless the lawyer has grounds to believe that the verdict may be subject to legal challenge based upon juror misconduct. Thus, counsel for the Millses was legally prohibited from initiating an investigation of the jury room misconduct which ultimately came to the attention of Ocie Mills. *See also Roland v. State*, 584 So. 2d 68 (Fla. 1st DCA 1991).

Morgan's Sixth Amendment right to counsel which was at issue in *Morgan.* Just as Morgan was entitled to a writ to protect that right, so also are Ocie and Carey Mills entitled to a writ here to vindicate their Sixth Amendment right to trial by an impartial jury.

II

WRIT OF CORAM NOBIS IS PARTICULARLY JUSTIFIED BECAUSE THE MILLSES' CONVICTIONS WERE NOT ONLY TAINTED BY JUROR MISCONDUCT, BUT WERE BASED UPON INNOCENT CONDUCT THAT TRADITIONALLY HAS BEEN CONSIDERED PERFECTLY LEGAL

The importance of this case should be apparent. This case arises because a father and son spent 21 months in prison, a year of supervised release, and paid significant fines for engaging in conduct that is now all but conceded to have been lawful conduct by them on their own property. *United States v. Mills*, 817 F. Supp. at 1548. Such a set of facts, where parties are first convicted of violating the law on the basis of conduct that was innocent and probably legal, only later to find that their convictions were also tainted by blatant jury misconduct, should cause outrage in anyone concerned about personal liberty in this country. But beyond outrage, the facts of this case fashion an additional, unique prism which supports the granting of certiorari in this case.

As recognized by the district judge at one point during the course of this saga, "[t]his case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act." *Id.* The Millses were incarcerated for dumping clean sand on land owned by them that was not "wet" in any ordinary sense of the word. At the time of the alleged offense, the land was most probably not even a "wetland" within the Corps' perversion of the term contained in the

regulatory hydra of the Clean Water Act. In short, the Millses were convicted based upon a counter-intuitive application of a regulatory definition promulgated not by Congress, but rather by the United States Corps of Engineers during the course of a rulemaking process ordinarily employed for regulatory rather than criminal purposes.[6]

Since 1970, the federal government has dramatically increased its regulatory and enforcement activity. Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. Chi. Legal F. 607 (1997). Up until the 1980's, however, these statutes were commonly enforced through civil enforcement procedures and the penalties imposed were rather mild. *Id.* at 608. However,

> [i]n the 1980s and early 1990s Congress significantly enhanced criminal provisions in the nation's environmental laws. It introduced new, more serious crimes and stiffened penalties across the board. Now, most violations are felonies with accordingly significant fines and prison sentences. Congress also enacted a pair of laws that bestowed greater resources and powers on the EPA to enforce environmental laws criminally. Furthermore, the Federal Sentencing Guidelines, enacted in 1987, contain specific provisions for environmental crimes and make prison sentences considerably more likely.

Id. at 608-09 (footnotes omitted).

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[6] This raises additional constitutional questions. *See United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989) (In order to be valid, a penal law must provide a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."); *Liparota v. United States*, 471 U.S. 419, 424 (1985) (The penal laws of the United States are creatures of Congress and required to be so under constitutional separation of powers.).

The trend toward criminal enforcement of environmental laws has serious potential consequences for ordinary citizens who merely wish to know and abide by the law, because environmental laws are notoriously ambiguous. For example, the Clean Water Act, which the Millses stand convicted of having violated, prohibits the discharge of fill or dredged material into **navigable waters** (33 U.S.C. § 1344) without the issuance of a permit pursuant to 33 U.S.C. § 404. Section 1344 also refers to these navigable waters as **waters of the United States**. Thus, an ordinary citizen wishing to exercise care might reasonably ask whether all wetlands wherever located are subject to the prohibition?[7] If so, what constitutes a wetland? Does a dry lot qualify that has vegetation sometimes found in wetland areas, but which has no standing water, or hydric soils?[8] And for that matter, since section 404 only applies if a pollutant is added to the wetlands from a "point source,"[9] is a

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[7] In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court ruled that wetlands adjacent to navigable waters qualify, but did not address isolated wetlands

[8] The Corps of Engineers has defined by regulation wetlands to mean "[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(8)(b) (1998). The Corps of Engineers has also drafted an entire technical manual to help scientists define a jurisdictional wetland. *See 1987 Wetland Delineation Manual*, Wetlands Research Program Technical Report Y-87-1.

[9] The Act defines "point source" as

> any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling

(continued...)

human being, such as Ocie Mills, a point source when he is spreading sand on his lot? Apparently, these ambiguities had no dissuading impact on the government's decision to prosecute the Millses.[10] However, ambiguities such as these leave "significant discretion to courts, prosecutors, and bureaucrats to resolve textual uncertainty [in the laws]" well beyond that existing in the usual criminal prosecution. Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. Chi. Legal F. at 608. Discretion of such breadth provides the leeway for the government to define an offense after the conduct has occurred, an idea which should be as repulsive to a person interested in ordered liberty as the introduction of extraneous evidence into a jury room.

Despite these ambiguities, the harsh and unyielding hand of criminal prosecution continues. EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were

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[9] (...continued)

> stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

[10] This Court has frequently admonished that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). *See also United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison. Kevin A. Gaynor, Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l. Envtl. L. & Pol'y 39, 40 (Winter, 1999). At the same time amendments to the statutes have expanded the scope of criminal liability by introducing lower or no intent crimes, such as the recent criminalization of merely negligent conduct under the Clean Air and Clean Water Acts. 42 U.S.C. § 7413(c)(4); 33 U.S.C. § 1319(c)(1). Some courts have also provided aid and comfort to the expansion of criminal liability by interpreting violations of environmental statutes to be "public welfare offenses." In such cases, the government is allowed to do away with the presumption of innocence and apply strict criminal liability by not having to establish any mens rea. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1283-84 (9th Cir. 1994).

The expansion of criminal liability under the federal environmental laws coupled with the lowering of the bar for convictions and rising penalties creates complicated issues of culpability for those accused of running afoul of environmental laws. As the grounds for criminal liability for violations of complex and ambiguous laws expand, ordinary citizens run an increasing risk of criminal conviction for wholly innocent conduct. The imposition of criminal penalties under these circumstances, especially where there is no criminal intent, is incompatible with a free society. *See Morissette v. United States,* 342 U.S. 246, 252 (1952) ("wrongdoing must be conscious to be criminal").

The Millses unfortunately fell into this very trap. They were subjected to criminal penalties for placing clean sand on their dry land. The United States Army Corps of Engineers interpreted this action to violate the Clean Water Act's less than obvious provisions prohibiting the discharge of fill into navigable waters without a permit. They were not even afforded a fair trial free of jury misconduct. Their

circumstances rise to the level of "an error of law of the most fundamental character." The Court should grant the writ of certiorari, address this important issue, and reverse the lower court.

CONCLUSION

Ocie and Carey Millses stand convicted of crimes in a trial infected with fundamental error that they did not and could not have reasonably discovered before the time had passed for them to seek relief under the normally employed statutes and procedures. Moreover, their crimes were based upon the counter-intuitive application of a constitutionally questionable, complex environmental regulatory scheme promulgated not by Congress, but rather by a federal agency. This scheme puts ordinary citizens at risk for criminal prosecution based upon innocent conduct that has traditionally been considered perfectly legal and noncriminal. PLF submits that this case presents compelling circumstances for the issuance of a writ of error *coram nobis* and that the lower court's failure to approve a grant of such a writ conflicts with the settled law of this Court.

DATED: December, 2000.

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In the Supreme Court of the United States

OCIE MILLS AND CAREY MILLS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether an allegation that a jury based its verdict on evidence extrinsic to the trial alleges an error that constitutes a ground for vacating a criminal conviction under a writ of coram nobis.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 221 F.3d 1201. The order of the district court (Pet. App. 11-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the Northern District of Florida convicted petitioners on five counts of discharging pollutants into the waterways of the United States without a permit, in violation of provisions of the Clean Water Act, 33 U.S.C. 1311(a), 1319(c), and on one count of illegally excavating a canal into the waterways of the United States, in violation of Sections 10 and 12 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, 406. The district court sentenced petitioners each to 21 months' incarceration, followed by one year of supervised release. The court of appeals affirmed on appeal. Petitioners also filed an unsuccessful motion pursuant to 28 U.S.C. 2255 to challenge their convictions. Petitioners completed their terms of imprisonment on November 21, 1990, and their terms of supervised release on November 21, 1991. They then filed the instant petition for a writ of error coram nobis, alleging that the jurors in their original criminal trial had relied on extrinsic evidence. The district court held that such relief was available on their claim, but it granted the government's motion to certify the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, holding that coram nobis is not available for petitioners' claim.

1. The writ of coram nobis is an ancient writ available at common law to correct errors discovered after the conclusion of trial proceedings. *United States* v. *Morgan*, 346 U.S. 502, 507-510 (1953). By rule, the writ has been abolished in federal civil cases. Fed. R. Civ. P. 60(b). In *Morgan*, however, this Court held that Rule 60(b) is not applicable to criminal cases, 346 U.S. at 505-506 n.4, and that federal courts may issue writs of coram nobis pursuant to the All Writs Act, 28 U.S.C.

1651(a), under certain circumstances in some criminal cases, 346 U.S. at 512. Such circumstances, however, are exceedingly rare. See *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (noting that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate") (quoting *United States* v. *Smith*, 331 U.S. 469, 475 n.4 (1947)).

2. Petitioners acquired two parcels of property in Santa Rosa County, Florida, adjacent to the Gulf of Mexico. In 1985, prior to that acquisition, the United States Army Corps of Engineers had determined that much of one of the lots was a wetland. The Corps had ordered the owner of the property to stop filling the site in preparation for some construction and either to restore the property or to seek an after-the-fact permit. Petitioners then acquired the unrestored property, "with full knowledge of the problems surrounding its partial designation as wetlands." *Mills* v. *United States*, 36 F.3d 1052, 1054 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995). Petitioners themselves then deposited fill material on the site, despite having received two additional cease and desist letters. They also impermissibly enlarged an existing drainage ditch. *Ibid.*

3. Petitioners were found guilty after a jury trial of five violations of the Clean Water Act and one violation of the Rivers and Harbors Act of 1899. They were each fined $5,000 and sentenced to 21 months' imprisonment, to be followed by one year of supervised release. The court of appeals summarily affirmed their convictions and sentences. *United States* v. *Mills*, 904 F.2d 713 (11th Cir. 1990) (Table). See 36 F.3d at 1054.

While they were on supervised release, petitioners filed a motion under 28 U.S.C. 2255, asserting that their convictions were invalid because Congress had uncon-

stitutionally delegated legislative powers to the Corps of Engineers, they were selectively prosecuted for exercising their First Amendment rights, the trial court had violated the Due Process Clause when it prevented them from pursuing an estoppel defense at trial, and the property had not been a wetland when they added soil fill to it. 36 F.3d at 1054-1055. The district court denied relief. *United States* v. *Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993). The court of appeals affirmed. 36 F.3d 1057. This Court denied certiorari. *Mills* v. *United States*, 514 U.S. 1112 (1995). On November 21, 1991, during the pendency of petitioners' Section 2255 motion, they completed their terms of supervised release. Gov't C.A. Br. 6.

2. In April 1996, petitioners filed a petition for a writ of error coram nobis seeking to vacate their convictions. The basis for the petition was an attached affidavit from one of the jurors from the 1989 trial, who had contacted petitioner Ocie Mills after seeing him air his grievances against the government in a television program. The affidavit of the juror stated that the foreman of the jury had provided the jury with information about petitioners' prior behavior that was extrinsic to the trial. Pet. App. 3.

The government's response to the coram nobis petition argued that the petition did not allege the type of error that is a ground for relief under the writ of coram nobis. The government pointed out that in *United States* v. *Mayer*, 235 U.S. 55 (1914), this Court held that coram nobis is available only "in those cases where errors were of the most fundamental character," and that such errors did not include "cases of * * * the misbehavior or partiality of jurors," such as was alleged by petitioners. *Id.* at 69. The district court, without discussing *Mayer*, rejected the government's request to

dismiss the petition. Pet. App. 11-17. The court then certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

The Eleventh Circuit accepted the appeal and reversed the district court's order. Pet. App. 1-10. The court explained that in *Mayer*, this Court had "held that the proper remedy '[i]n cases of prejudicial misconduct in the course of trial, the misbehavior or partiality of jurors, and newly discovered evidence' is 'by motion for a new trial.'" *Id.* at 7 (quoting *Mayer*, 235 U.S. at 69). The court noted that "[s]ubsequent controlling opinions," including this Court's decision in *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954), "have treated *Mayer* as the source of the applicable rule governing the circumstances under which coram nobis relief is available." Pet. App. 7. Under that rule, petitioners' claims, which were indistinguishable from some of the claims that the Court in *Mayer* held were insufficient to make out a claim for coram nobis, did not warrant relief.

The court of appeals recognized, as petitioners argued, that this Court in *Mayer* had rested its decision on two grounds—first, that the nature of the claim does not warrant a writ of coram nobis and, second, that the defendant in that case had deprived the district court of jurisdiction over the case by taking an appeal prior to seeking coram nobis relief in the district court. But, the court held, this Court's two grounds for its decision in *Mayer* were "independent, each alone sufficient to dispose of the case." Pet. App. 10. Thus, this Court's "holding in *Mayer* that [the defendant's] appeal of his conviction deprived the district court of jurisdiction did not affect its separate holding that [the defendant] had failed to allege error of a fundamental character such as would have warranted the pursuit of coram nobis relief

at common law." *Ibid.* The court stated that petitioners' argument that "juror misconduct [is] an error of the most fundamental character" such that coram nobis could be warranted is, "as a theoretical proposition, * * * not without persuasiveness," *id.* at 8, but the court held that it was foreclosed by *Mayer*.

ARGUMENT

The decision of the court of appeals was correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 6) that they satisfy the requirements for a writ of coram nobis as set forth in *Morgan*. In *Morgan*, this Court held that federal courts were authorized to issue writs of coram nobis when the following elements are present: (1) the alleged error is "of the most fundamental character," (2) "no other remedy [is] available," and (3) "sound reasons exist[] for failure to seek appropriate earlier relief." 346 U.S. at 512. Applying those standards, the Court held that the defendant in *Morgan*, who had been tried without counsel and without waiving his right to counsel, had alleged an error "of the most fundamental character," and that coram nobis was accordingly available. *Id.* at 512-513.

Petitioners claim (Pet. 9) that, because a jury's consideration of extrinsic evidence violates the Sixth Amendment right to trial by an impartial jury, their complaint's allegations that the jury considered extrinsic evidence alleges an error "of the most fundamental character" under *Morgan*. That claim is, however, foreclosed by *Mayer*. This Court recognized in *Mayer* that coram nobis is available, if at all, only for claims "of the most fundamental character," and it held that "the

misbehavior or partiality of jurors" is not such an error. 235 U.S. at 69. Nothing in *Morgan*, which adopted the *Mayer* formulation that coram nobis is available only for claims "of the most fundamental character," is inconsistent with that holding. 346 U.S. at 512. Petitioner's suggestion that *Morgan* overruled *Mayer sub silentio*, and thereby opened the door for defendants to seek to have their convictions invalidated on a wide variety of claims years after their sentences have been discharged and their direct and collateral attacks on their sentences have been rejected, is mistaken.*

2. Post-*Morgan* decisions of this Court and the courts of appeals confirm that *Morgan* did not overrule *Mayer sub silentio*. Those decisions, like the decision of the court of appeals in this case, have continued to treat *Mayer* as a source of controlling authority on the availability of coram nobis relief. See, *e.g.*, *Carlisle*, 517 U.S. at 429; *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979); *Foont* v. *United States*, 93 F.3d 76, 78 (2d Cir. 1996); *Lowery* v. *United States*, 956 F.2d 227, 230 (11th Cir. 1992) (per curiam); *United States* v. *Michaud*, 925 F.2d 37, 39 (1st Cir. 1991); *Hirabayashi* v. *United States*, 828 F.2d 591, 604 (9th Cir. 1987), *Flippins* v. *United States*, 747 F.2d 1089, 1091 (6th Cir. 1984) (per curiam); *Granville* v. *United States*, 613 F.2d 125, 126 n.1 (5th Cir. 1980) (per curiam); *Owensby* v. *United*

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* Indeed, even if petitioners' claim were not foreclosed by *Mayer*, there would still be no merit to their claim (Pet. 9) that the error they allege must be cognizable in coram nobis because it is "no less important" than the error in *Morgan*. The error involved in *Morgan*, deprivation of the right to counsel, is "a unique constitutional defect" so fundamental that it has "jurisdictional significance." *Custis* v. *United States*, 511 U.S. 485, 496, 494 (1994). This Court has never held that the same can be said of claims of trial error like those alleged by petitioners.

States, 353 F.2d 412, 416 (10th Cir. 1965), cert. denied, 383 U.S. 962 (1966); *Bateman* v. *United States*, 277 F.2d 65, 67 (8th Cir. 1960).

3. Maintaining the narrow scope of the writ of coram nobis, as described in *Mayer*, *Morgan*, and their progeny, upholds important principles at the core of our criminal justice system. As this Court has explained, "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 511 U.S. 485, 497 (1994) (quoting *Addonizio*, 442 U.S. at 184 n.11); see also *Moody* v. *United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (noting that expanding the scope of coram nobis "would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal convictions") (citing *Morgan*, 346 U.S. at 511), cert. denied, 493 U.S. 1081 (1990). Petitioners' contention that the scope of coram nobis should be expanded to apply here would undermine the finality of criminal convictions as well as the sanctity of jury deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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